NO. S-S-254452
NEW WESTMINSTER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

AIR PASSENGER RIGHTS

PETITIONER

AND

WESTJET AIRLINES LTD and CIVIL RESOLUTION TRIBUNAL

RESPONDENTS

RESPONSE TO PETITION

Filed by: WestJet Airlines Ltd.

THIS IS A RESPONSE TO the Petition filed July 29, 2024.

Part 1: ORDERS CONSENTED TO

WestJet Airlines Ltd. consents to the granting of the orders set out in the following paragraphs of Part 1 of the Petition: NONE.

Part 2: ORDERS OPPOSED

WestJet Airlines Ltd. opposes the granting of the orders set out in paragraphs 1 to 3 of Part 1 of the Petition.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

WestJet Airlines Ltd. takes no position on the granting of the orders set out in paragraphs NIL of Part 1 of the Petition.

Part 4: FACTUAL BASIS

Background

1. The Petitioner, Air Passenger Rights, is a corporation, incorporated under the *Canada Not-for-profit Corporations Act*, with an address for service of c/o Simon Lin, registered director of the Petitioner and counsel for the Petitioner, of 4388 Still Creek Drive, Suite 237, Burnaby, BC.

2. The Respondent, WestJet Airlines Ltd., is an Alberta corporation and is extra-provincially registered in British Columbia with an address for service of 2700-700 West Georgia Street, Vancouver, BC, V7Y 1B8 ("WestJet").

3. The Petitioner seeks judicial review of a final decision of *Boyd v. WestJet Airlines Ltd,* 2024 BCCRT 640 (the "Decision") made by the British Columbia Civil Resolution Tribunal (the "Tribunal". The Petitioner is asking the Court to: (1) set aside a portion of the Tribunal's order; (2) grant the $2,000 claim under s.19 of the *Air Passenger Protection Regulations* (SOR/2019-150) ("*APPR*"); or (3) to remit the claim back to the Tribunal. By doing so, the Petitioner seeks to re-litigate issues that have already been decided.

4. There is no merit to the relief sought because the Tribunal made the Decision on findings of fact.

5. The Tribunal was correct in arriving to its conclusion that the "72-hour notice" issued prior to a strike or lockout (the "Strike Notice") was a "labour disruption".

6. In the alternative, if there was an issue with respect to the interpretation of "labour disruption", which is denied, the findings of fact made by the Tribunal still apply and are not to be displaced. The question of law, as expressed by the Petitioner, does not entitle the Petitioner to the relief sought.

The Application to the Tribunal

7. Ms. Anne Boyd and Mr. Robert Boyd purchased air tickets on November 21, 2022, via a travel agent to fly on the following series of flights from Kelowna to Rome on May 18, 2023 (the "Purchasers"):

    (a) WS 3162 from Kelowna, British Columbia to Calgary, Alberta, which was scheduled to depart at 14:00 PDT and to arrive at 16:09 MDST; and

    (b) WS 032 from Calgary, Alberta, to Rome, Italy, which was scheduled to depart at 18:05 MDST and to arrive at 11:55 CET.

8. The Purchasers were scheduled to arrive in Rome on May 19, 2023, at 11:55am.

9. The Purchasers travelled on WS 3162 from Kelowna to Calgary, as scheduled.

10. WS 032 was cancelled due to the ongoing labour disruption involving WestJet's pilots.

11. Following the cancellation of WS 032, WestJet rescheduled the passengers on flights operated by other carriers:

    (a) WestJet flight WS 3628 from Calgary to Portland on May 19, 2023;

    (b) Delta Airlines flight DL 0178 from Portland to Amsterdam on May 20, 2023; and

    (c) Italia Transporto Aero flight AZ 0107 from Amsterdam to Rome on May 20, 2023.

12. The Purchasers arrived in Rome on May 20, 2023, over 24 hours later than originally scheduled.

13. As a result of the travel delay, the Purchasers brought an application to the Tribunal and sought to recover:

    (a) $185.25 for a hotel in Calgary on the night of May 18, 2023;

    (b) $92.00 for meals purchased from May 18, 2023, to May 20, 2023; and

    (c) $2,000 ($1,000 per guest) in compensation for their delay under s. 19(1) of the *APPR*

    (the "Dispute").

Contract of Carriage and the *APPR*

14. The Purchasers are bound by the terms and conditions (the "Terms and Conditions") of the airline passenger ticket, and the Terms and Conditions of WestJet's International Tariff (the "Tariff"), which together comprise the contract of carriage (collectively, the Contract of Carriage") and limit and/or proscribe the Purchaser's right of recovery against WestJet.

15. At the Tribunal, WestJet submitted the following:

    (a) The Tariff, Terms and Conditions, and the *APPR* do not provide a basis for the $2,000 in *APPR* compensation sought.

    (b) The relief sought by the Purchasers are subject to the *APPR*. The *APPR* are included in the Tariff, along with the Terms and Conditions, which comprise the contract of carriage between WestJet and the Purchasers.

    (c) The APPR provides that airlines are obligated to provide compensation for inconveniences incurred due to delays or cancellations in certain circumstances. Eligibility for compensation depends on (1) the cause of the delay/cancellation; and (2) the length of the resulting delay.

    (d) When a delay is within carrier control, s. 19 compensation is generally owed. However, when a delay is outside of carrier control, compensation under s. 19 is not owed.

    (e) The cancellation of flight WS 032 was outside of carrier control, as it occurred due to a labour disruption. The *APPR* is clear that a labour disruption, even those involving the carrier's own employees, is outside of carrier control under s.10.

    (f) When s. 10 applies to a cancellation or delay, s.19 does not apply, and as such, compensation for delay is not owed.

    (g) The Purchaser argued that because there was no active picketing by the pilots at the time of the cancellation of WS 032, there was no actual strike. In response, WestJet submitted that the *APPR* does not use the term "work stoppage" or "strike", but rather the broader "labour disruption".

    (h) There is no basis upon which to find that "labour disruptions" under s.10 of the *APPR* require "active picketing" or a "work stoppage" in order to apply.

    (i) A plain reading of the *APPR*, statements made by the Canadian Transportation Agency (the "*Agency*"), including the Regulatory Impact Analysis Statement ("RIAS"), and the *Burym et al v WestJet Airlines Ltd,* File #SC23-01-44117 (unreported) decision all support a finding that "labour disruptions" should be more broadly interpreted: the announcement of a strike constitutes the decisive moment when contractual obligations are suspended, and labour activities are fundamentally disrupted.

    (j) The cancellation was outside of carrier control under s.10, and s.19(1) compensation is therefore not due.

Affidavit #1 of C. Machado at Exhibit "G"

16. At the Tribunal, it was not disputed that the cancellation of the Applicants' flight WS 032 occurred both after the Strike Notice was issued, and because of the ongoing labour dispute between the pilots and WestJet.

Labour Disruption

17. WestJet pilots are represented by the Air Line Pilots Association ("ALPA"). In May 2023, the pilots and ALPA were in the process of negotiating a new Collective Agreement with WestJet.

18. Pursuant to the Canada Labour Code, the Strike Notice was formally issued on May 15, 2023. Upon the expiry of the 72-hour period in the Strike Notice, the pilots were authorized to strike, beginning at 3:00am MDT on May 19th, 2023.

Affidavit #1 of C. Machado at Exhibit "D"

19. Ultimately, the pilots and WestJet came to an agreement at approximately 12:00am MDT on May 19, 2023.

Affidavit #1 of C. Machado at Exhibits "D", "E", and "F"

Procedural History Before the Tribunal

20. The Tribunal is British Columbia's first online tribunal. The Civil Resolution Tribunal Act [SBC 2012] Chapter 25 (*CRTA*) mandates the Tribunal to provide dispute resolution services in a manner that is "accessible, speedy, economical, informal and flexible", with a focus on electronic communication and dispute resolution.

21. Pursuant to the *CRTA*, the Tribunal has jurisdiction over small claims matters subject to its limited monetary jurisdiction of $5,000.00.

22. A party that chooses to proceed with the Tribunal's dispute resolution process must complete an initiating document commonly known as a Dispute Notice and pay a filing fee. The Tribunal must accept a dispute if, on initial review, the claim appears to be within the Tribunal's jurisdiction.

23. If a dispute is accepted, the Tribunal will usually issue a Dispute Notice Package on all parties, which includes a Dispute Notice and instructions for responding to the Dispute Notice. Once a responding party has filed its Dispute Response, the Tribunal's formal dispute resolution process begins; it can be categorized into two (2) phases: the Case Management Phase, commonly known as facilitation, and the Tribunal Hearing Phase, commonly known as adjudication.

24. The Tribunal proceedings were commenced by the Purchasers on July 4, 2023. The Dispute Notice was issued on July 31, 2023.

25. The relief sought by the Purchasers in their Dispute Notice was compensation for delay of $2,277.25. WestJet filed its dispute response on August 30, 2023.

26. The Purchasers and WestJet were unable to resolve the dispute and it proceeded to the adjudication phase of the Tribunal process.

27. The Tribunal has wide discretion over its procedure, including the discretion to conduct a hearing by written submissions, telephone or email: *CRTA*, ss. 38, 39. The Tribunal can

accept and admit any evidence it considers necessary and is not bound by the rules of evidence: *CRTA*, s. 42.

Affidavit #1 of C. Machado at Exhibit "A", para 4

The Decision

28. The Dispute proceeded by way of written submissions. The Tribunal determined that a written hearing was appropriate because it was of the view that it could properly assess and weigh the evidence and submissions before it and saw no reason for an oral hearing.

Affidavit #1 of C. Machado at Exhibit "A", para 4

29. The issues raised for the Tribunal were:

    (a) Are the Boyds entitled to $2,000 in compensation for the delayed flight?

    (b) Are the Boyds entitled to reimbursement of $277.25 for their hotel stay and meals?

30. The Tribunal made the following findings of fact in the Decision:

    (a) the incident which caused the delay was a strike;

    (b) the strike was outside of WestJet's control;

    (c) the long-standing rule of statutory interpretation applies;

    (d) the Agency's statements provide insight into the intent of the regulation's drafters intent;

    (e) the 72-hour Strike Notice qualifies as a "labour disruption"; and

    (f) the reason for the delay is outside WestJet's control.

31. The Tribunal cited the correct rule of statutory interpretation in its determination that the "labour disruption" cannot be so narrowly interpreted to mean "only" if there is a work stoppage or actual strike occurring. The legislature's chosen words are "to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

Affidavit #1 of C. Machado at Exhibit "A", para 14; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC)

32. The Decision cites section 8 of the BC *Interpretation Act,* [RSBC 1996] Chapter 238. Although the Petitioner is correct in asserting that it is the federal *Interpretation Act* ((R.S.C., 1985, c. I-21)), s.12 that applies, the wording in each provision is exactly the same.

33. WestJet says that the naming of the BC *Interpretation Act* rather than the federal *Interpretation Act* has no effect on the statutory interpretation exercise undertaken by the Tribunal in arriving to its conclusion that:

    Section 10(1) of the APPR states a "labour disruption within the carrier" is not within the airline's control. The parties agree this dispute turns on whether a strike notice and

lockout notice qualify as a "labour dispute". If so, the Boyds' flight delay was not in WestJet's control.

Affidavit #1 of C. Machado at Exhibit "A", para 12

34. WestJet was ordered to reimburse the Boyds for their hotel stay and meals, plus interest, for a total of $355.53.

PART 5: LEGAL BASIS

35. The Petitioner's petition ought to be dismissed on the following basis:

    (a) The Petitioner does not have standing to bring this judicial review.

    (b) The Purchaser's and the Petitioner's absolute assignment of rights is invalid at law.

    (c) The Decision was correct. There is only one correct interpretation, of which the Tribunal arrived.

    (d) The Petitioner raises arguments not raised before the Tribunal.

    (e) The Petitioner's affidavit, which is required in order to bring an action for judicial review, is inadmissible.

    (f) There is no merit to this Petition.

Petitioner Does not Have Standing

36. The Petitioner does not have standing to bring an action for judicial review.

37. Standing is a threshold issue in judicial review proceedings. Only a petitioner who can either demonstrate private interest standing or who can persuade the Court to grant public interest standing will be entitled to seek judicial review of administrative decisions.

Gonzales Hill Preservation Society v. Victoria (City) Board of Variance, 2021 BCSC 2091 at paras. 53 to 88 [*Gonzales*]

38. Gonzales sets out the general test for private interest standing, noting:

> "that the petitioner must be "aggrieved", "affected" or suffer some "exceptional prejudice" because of the impugned decision. This test is set out in *Bradshaw v Workers' Compensation Board*, 2017 BCSC 1092 at para. 89:
>
> > [89] The authors of Brown and Evans, Judicial Review of Administration Action in Canada (Toronto: Carswell, 2014) v. 2, state the test in these terms at para. 4:3420:
> >
> > At common law a person will have standing to seek a remedy in proceedings of judicial review if he or she is an "aggrieved person," an "affected person", or someone who is "exceptionally prejudiced" by the impugned administrative action. The requirements of any of these expressions of the common law test are two-fold: first an identification of the interest and, second, an assessment of its remoteness."
>
> *Gonzales* at 60

39. To be accorded standing, a petitioner must demonstrate an interest in the proceeding. A petitioner will have an interest in the proceeding where he or she has a private right that has been infringed by the respondent, or which will cause or threaten to cause special damage which extends beyond that suffered by the general public. This interest may also be conferred by statute.

Emerman v. Association of Professional Engineers, 2008 BCSC 1186 at para. 19

40. The sufficiency of the interest of the applicant can be demonstrated by the statutory regime underlying the impugned decision.

Sandhu v. British Columbia (Provincial Court), 2013 BCCA 88 at para. 35

41. There is no provision in the *CRTA* that confers standing to any person but the applicant.

42. The proposition that a petitioner must suffer some special form of damage beyond that suffered by the general public is also addressed in *Alberta Liquor Store Association v. Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904 [*Alberta Liquor*].

43. An important factor includes the relationship between the applicant and the challenged decision. If the applicant can demonstrate some interest in challenging the administrative act, but that interest is found by the court to be contrary to the objects and purposes of the administrative regime, the court will not allow the judicial review process to be used to disrupt the administrative system.

Alberta Liquor, at 9 and 15

44. There is a line of cases which holds that the applicant must itself be aggrieved, and it is not sufficient that the applicant have members that are aggrieved.

Alberta Liquor, at 19

45. To have standing, the petitioner must show that it has a particular interest or that it has suffered or will suffer injury or damage peculiar to itself. Where the petitioner is an inanimate incorporated society with a legal status separate and distinct from that of its members, it cannot be said that it, as a legal entity, has a particular interest distinct from that of other concerned citizens…:

> How can it be said that it, as a legal entity, has suffered, or will suffer, injury or damage peculiar to itself? Put at its highest, the society is in the position of a concerned corporate citizen — that is not sufficient to grant standing. It may very well be that some of its members have a particular interest which would give them standing — but the society is distinct from its members. I must hold that the society lacks the necessary standing.
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> [Emphasis added.]

Village Bay Preservation Society v. Mayne Airfield Inc. (1982), 1982 CanLII 275 (BC SC) at 11; *Sea Shepherd Conservation Society v. British Columbia* (1984), 1984 CanLII 504 (BC SC) at 13

46. The Petitioner is a non-profit corporation and does not in itself purchase airline tickets. It can neither benefit nor suffer any direct adverse impact from the Decision.

Independent Contractors and Business Association v. Canada (Minister of Labour), 1998 CanLII 7520 (FCA) at 30

Absolute Assignment is Invalid at Law

47. The absolute assignment of the Purchasers' rights to claims against WestJet is invalid at law.

48. There are two reasons why courts do not permit the assignment of choses. The first is that contracts created obligations which were strictly personal; and the second is maintenance and champerty.

Fredrickson v. I.C.B.C., 1986 CanLII 1066 (BC CA) [*Fredrickson*] at 44

49. While the Courts of Equity did recognize and enforce assignments, there are six categories of contracts which are considered to be unassignable. They are:

(a) contracts which expressly by their terms exclude assignment;

(b) mere rights of action (assignments savouring of maintenance and champerty);

(c) contracts which by their assignment throw uncontemplated burdens on the debtor;

(d) personal contracts;

(e) assignments void by public policy (public officers' wages or salary and alimony or maintenance agreements); and

(f) assignments prohibited by statutory provisions.

Fredrickson at 44; *Chitty on Contracts*, 25th ed. (1983), pp. 709-15

50. An exception to personal contracts being assigned include a cause of action for damages based on breach of contract. This is a petition for judicial review, and not a cause of action for damages.

51. All champertous agreements are forbidden and invalid. In *McIntyre Estate*, the Court of Appeal for Ontario defined maintenance and champerty as follows:

> Although the type of conduct that might constitute champerty and maintenance has evolved over time, the essential thrust of the two concepts has remained the same for at least two centuries. Maintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which the maintainer has no interest whatsoever and where the assistance he or she renders to one or the other parties is without justification or excuse. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation. Importantly, without maintenance there can be no champerty.
>
> [Emphasis added.]

52. The Law of Contracts, 5th ed., after noting the different views on the question, concludes at p. 523 that "[t]he best approach is to avoid generalisation and to ask in each case whether *this* assignment savours of maintenance".

53. The Petitioner is a not-for-profit corporation, distinct from its members. The corporation has no interest whatsoever in the litigation of others. The Petitioner is an officious intermeddler, becoming involved in a dispute in which it has no interest. It also, through the assignment agreement, shares in the profits of the litigation, which is the very definition of champerty. This assignment savours of maintenance.

54. An assignment agreement will be held to be void, or invalid, where the court finds that the assignment savours of maintenance.

55. Further, the Petitioner essentially seeks a second chance at responding to WestJet's submissions at the Tribunal by bringing this judicial review. The Purchasers had a chance to reply, and the Tribunal considered the record of evidence and submissions in its entirety.

56. The courts allowing the Petitioner to essentially re-litigate the Decision would open the floodgates to other parties absolutely assigning their rights to other intermeddlers for the purpose of judicially reviewing decisions, so that they could obtain a second chance, if they did not receive the relief that they wanted. This would lead to further waste of court and tribunal resources.

Standard of Review

57. The *CRTA* governs judicial review of the Tribunal's decisions. The standard of review if the Tribunal has exclusive jurisdiction or specialized expertise is patent unreasonableness, the highest standard of review.

CRTA at s.56.7

58. Section 56.8 governs the standard of review of other tribunal decisions, with the exception of discretionary decisions. The Decision is a final decision.

59. The Petitioner seeks to dispute a question of law, which falls under the standard of correctness.

60. There is no dispute regarding the standard of review that applies on a judicial review of the Decision with respect to questions of law.

61. When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view of the question.

Dunsmuir v. New Brunswick, 2008 SCC 9 (CanLII), [2008] 1 SCR 190, at para. 50

62. The Decision, in its entirety, is not reviewable on the standard of correctness. The Tribunal made findings of fact, that cannot be interfered with by the court unless the Petitioner can show that there is: (1) no evidence to support the finding; or (2) in light of the evidence, the finding is otherwise unreasonable.

CRTA at s.56.8(2)

63. Where the question is one of fact, discretion or policy, deference will usually apply automatically.

Canada (Attorney General) v. Mossop [1993] 1 S.C.R. 554S(S), at pp. 599-600; *Dunsmuir* at 53

64. The deference owed to findings of fact includes primary factual findings and conclusions drawn from them, including inferences and interpretation of evidence as a whole, and credibility.

Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 15-25

65. The Petitioner seeks relief on the basis that a labour disruption does not include a lockout notice. The labour dispute and events flowing from such was found by the Tribunal to be a labour disruption, and outside of WestJet's control. These are questions of fact, and not reviewable on the correctness standard.

CRTA at s.56.8(3)

66. WestJet further asserts that the Tribunal's reasoning was correct and consistent with the principles of statutory interpretation. The Decision ought to stand.

The Tribunal Correctly Interpreted Section 10 of the *APPR*

67. The Petitioners allege that the Tribunal's legal interpretation of Section 10 of the *APPR* is erroneous by:

(a) Failing to consider the purpose of the *APPR*.

(b) Focusing on: (i) whether there were "situations outside of the carrier's control" and not on what the "labour disruption" entails; (ii) the reliance on extrinsic aids; and (iiii) the Tribunal overlooking direct causation legislative wording.

(c) The Notice Period prior to a strike being considered a "labour disruption" or "lockout" is unworkable.

68. These arguments are without merit.

Purpose of the APPR

69. The *Canada Transportation Act*, SC 1996, c 10 ("*CTA*") is the enabling statute of the *APPR*. The *APPR* is a federal regulation.

70. Section 10(1) of the *APPR* provides that:

> This section applies to a carrier when there is delay, cancellation or denial of boarding due to situations outside the carrier's control, including but not limited to the following:
> [...]
> (j) a labour disruption within the carrier or within an essential service provider such as an airport or an air navigation service provider.

71. The *APPR* is clear and unambiguous with respect to the purpose of the *Act*, context, and relevant legal norms by the inclusion of "strike" and "lockout notices" within "labour disputes" under s.10.

72. The Petitioner attempts to cite a provincial consumer protection statute to conflate the provincial regulation with purpose of the *APPR*, which would, on its face, be contrary to the principles of federalism and paramountcy. The use of the federal *Interpretation Act* rather than the *BC Interpretation Act* ultimately flows from the same logic.

73. The *APPR* were created to protect passengers, and clearly sets out situations where an air carrier is liable for compensation to a passenger as well as situations in which a balance must be struck with respect to situations outside of carrier control.

74. The statutory interpretation principle to interpret consumer protection laws generously in favour of consumers ought not result in punishment of the service provider.

Lukács v. Air Canada Rouge LP, 2023 FC 1358 [*Lukács*] at 56

75. The Petitioner attempts to establish a gap between the BC Court of Appeal and the Federal Court. There is no such gap. Unprofitability is not the concern here, but rather, ensuring that the collective bargaining process is a fair one. If flights are cancelled, the carrier loses profitability regardless. It is not in the interests of a carrier to (1) cancel flights; and (2) conduct any action that attracts the ire of the Agency in the form of penalties and/or the public perception of the carrier itself.

76. The Agency's role includes the protection of passengers. A carrier following the instructions of the Agency ought not be punished for conducting itself in the way it was permitted.

Modern Principles of Statutory Interpretation

77. Recent Supreme Court of Canada decision, *La Presse Inc. v. Quebec,* 2023 SCC 22 ("*LaPresse*") clarified the modern principles of statutory interpretation:

> [23] First, the plain meaning of the text is not in itself determinative and must be tested against the other indicators of legislative meaning — context, purpose, and relevant legal norms (*R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967, at para. 31). The apparent clarity of the words taken separately does not suffice because they "may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation" (*Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at para. 10).
>
> [24] Second, a provision is only "ambiguous" in the sense contemplated in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, if its words can reasonably be interpreted in more than one way after due consideration of the context in which they appear and of the purpose of the provision (paras. 29-30). This is to say that there is a "real" ambiguity — one that calls for the use of external interpretive aids like the principle of strict construction of penal laws or the presumption of conformity with the Canadian Charter of Rights and Freedoms — only if differing readings of the same provision *cannot* be decisively resolved through the contextual and purposive approach set out by Driedger (ibid.).
>
> [Emphasis added.]

LaPresse at 23 - 24

78. The context, "situations outside carrier control", provides clarity. *LaPresse* illustrates why one cannot isolate nor divorce the "labour disruption" from its context, which is essentially what the Petitioner seeks to do.

79. Alternatively, if "labour disruptions" are unclear as the Petitioner asserts, which WestJet denies, then extrinsic evidence, in the form of the Agency's Regulatory Impact Analysis Statement ("RIAS"), *aids* clarification.

Affidavit #1 of C. Machado at Exhibit "E"

The Agency

80. The Agency was involved in the drafting of the *APPR*. The Agency issued the RIAS, which confirms that the intent behind specifying "labour disruptions" as being outside carrier control (rather than using alternative terms such as "strike") was to avoid having the *APPR* be used as a tool to influence the collective bargaining process.

81. In the RIAS, under the heading "Clarity regarding categorization of flight disruptions", the CTA noted that:

> Some stakeholders would like there to be greater specificity and clarity in the regulations as to the situations that would be considered "required for safety purposes" and "outside the carrier's control". As it is not possible or desirable to be completely prescriptive in regulation, CTA will address these comments using a combination of regulatory adjustments and guidance materials for air carriers.

Affidavit #1 of C. Machado at Exhibit "E"

82. In direct response to the Petitioner's suggestion against the use of extrinsic aids, the Federal Court stated that that a RIAS can be accepted as an extrinsic aid to interpretation, relying on the decision in *Boutcher v. Canada*, 2001 NFCA 33 (CanLII), 202 Nfld. and P.E.I.R. 243 (Nfld. C.A.), at paragraph 76.

Lukács at 29

83. In the following section under the same heading, the CTA addressed concerns of certain stakeholders regarding labour disruptions:

> **c) Labour disruptions**
>
> Air industry stakeholders feel that the regulations should explicitly indicate that labour disruptions within an airline are "outside the carrier's control" to avoid influencing collective bargaining processes. The CTA agrees that it would be appropriate to give clarity in this area and has adjusted the regulations to specify that disruptions resulting from labour disruptions within the carrier or at an essential service provider (e.g., an airport) are considered outside the carrier's control.
>
> *[Emphasis added]*

Affidavit #1 of C. Machado at Exhibit "E" [RIAS]

84. Finally, on May 16, 2023, the CTA released a statement affirming that the WestJet labour disruption was outside of carrier control pursuant to s. 10 of the *APPR*. As such, it is WestJet's position that the labour disruption fell within s. 10 of the *APPR*, and s. 19 compensation is not applicable in the circumstances.

85. In *Burym et al v. WestJet Airlines*, File #SC23-01-44117 (unreported) ("*Burym*"), the court dismissed a claim seeking APPR compensation against WestJet as a result of the same labour disruption. The Court stated:

> *Ultimately, the Court's determination is that the declaration of the strike marked the onset of the labour disruption. It is the announcement of the strike that heralds the suspension of the contractual obligations and instigates a fundamental shift in labour relations thus establishing that a labour disruption was underway at the time of the claimants' flight cancellation, making it outside of carrier control.*
>
> *Burym* at p. 3

86. The Petitioner argues that the Tribunal overlooked the direct causation legislative wording that the flight disruption must be "due to" a situation outside the carrier's control. In direct response to this assertion, the Respondent says that this is not a question of law, but points to the findings of fact made by the Tribunal, including that the incident which caused the delay was a strike, and that the flight disruptions were due to the strike.

Petitioner's Definition would lead to Absurd Results

87. The Petitioner says that the Tribunal's interpretation would yield absurd results and mischiefs where an airline could pre-emptively issue lockout notices to escape *APPR* compensation.

88. The above argument is, in itself, absurd, and not the intended interpretation of "labour disputes" as provided for by the *APPR* and as indicated by the RIAS. To suggest that an airline would issue lockout notices to its employees for sole purpose of escaping *APPR* obligations is completely unrealistic and contrary to the spirit and provisions of the *Canada Labour Code*, R.S.C., 1985, c. L-2

89. Issuing a lockout notice to employees carries with it far ranging labour relations consequences and possible outcomes. There would be no economic or goodwill benefits that would result from the issuance of lockout notices in anticipation of a flight cancellation in order to avoid *APPR* obligations. Not only would an airline lose more profits by having to cancel flights due to a "lockout", but pre-emptively issuing lockout notices to escape *APPR* compensation and cancelling more flights would lead to further losses. There are other mechanisms to deal with such an issue if it were to occur, such as the Agency and the penalties the Agency can issue to carriers.

90. Further, if a Strike Notice is provided, a large carrier, such as WestJet, would need to prepare for shutting down operations prior to an actual strike occurring. There is no guarantee that discussions would lead to resolution, and in the meantime, it is necessary to ensure guest, crew, and pilot safety. Operations take time to shut down, and it cannot be done at the same moment as the strike begins, leaving many more guests and crew stranded without adequate preparation.

Arguments Not Raised Before Tribunal

91. The Petitioner seeks to simply re-litigate issues already decided. The limited scope of the court's role on judicial review gives rise to a number of specific procedural matters, including:

(a) **No New Evidence**: Except in limited circumstances, the court sitting on judicial review of an administrative decision may not consider evidence which did not form part of the record before the decision-maker; to do so would amount to usurping the role of the decision-maker by making a new decision on the basis of different evidence, as illustrated in *Actton Transport Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 272 at paras. 19-23, including:

> [21] The judge made a declaration in this case, but he arrived at that decision after conducting a de novo hearing in which he received new evidence ... However, the irregular nature of the process tends to confound the principles of appellate review.
>
> ...
>
> [23] While the Tribunal had to be correct in deciding the division of powers question, normally its decision would be reviewed on the record before it. The reviewing court usurps the role of the tribunal when it embarks upon a de novo hearing. The procedure adopted here was wrong and should not be repeated.

(b) ***No New Arguments***: Except in limited circumstances, the court may not consider as a ground for review an issue that was never raised before the tribunal; to do otherwise would undermine the integrity of the administrative scheme. If the tribunal was not asked to consider an issue, and therefore did not make a decision with respect to it, it cannot be said that the tribunal erred in law or otherwise lost jurisdiction.

Powell v British Columbia (Residential Tenancy Branch), 2015 BCSC 2046 at paras 49-51; *Alberta Teachers' Assn. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 at paras 22-26; and *Vandale v. Workers' Compensation Appeal Tribunal*, 2013 BCCA 391 at para 54.

92. Reduced to its essence, the role of the court on judicial review is not to hear new evidence or argument or to decide or re-decide the case; it is simply to ensure that the Tribunal (1) acted within its jurisdiction by deciding what it was directed to decide by its constituent legislation; and (2) did not lose jurisdiction by failing to provide a fair hearing or by rendering a decision outside the degree of deference owed by the reviewing court. As the standard in this case is correctness, the court's role is to ensure that the tribunal's interpretation of "labour disruption" was the correct one.

93. The Petitioner not only seeks to adduce new evidence, but also raises new arguments that were never raised before the Tribunal.

Petitioner's Affidavit is Inadmissible

94. WestJet respectfully says that the Affidavit #1 of Dr. Gábor Lukács is inadmissible (the "Affidavit").

95. The requirements for the commissioning of affidavits are set out in section 1 of Appendix A of the *Code of Professional Conduct for British Columbia*. During the COVID-19 pandemic, the Supreme Court introduced numerous notices to accommodate those suffering from COVID-19, where it is not possible or physically or medically unsafe for the deponent to physically attend before a commissioner.

96. The most recent BC Supreme Court Notice to the Profession, the Public and the Media with respect to affidavits for use in court proceedings notes that only with the approval of the Law Society of British Columbia can accommodations be made or used in any proceeding to the Supreme Court. With approval from the Law Society of British Columbia, affidavits are still subject to the discretion of the Courts to apply the best evidence requirements to their use.

Affidavit #1 of C. Machado at Exhibit "I"

97. There is concern whether the Petitioner's counsel, registered director of the Petitioner, obtained the mandatory approval prior to commissioning the Affidavit.

98. As such, the judicial review ought to be dismissed. A petition for judicial review cannot be brought without its supporting affidavit.

No Merit to this Judicial Review

99. In light of the foregoing, the Respondent respectfully submits that the Petitioner has not identified any basis upon which it can properly judicially review the Decision and the within proceeding has no prospect of success.

100. The Court is to provide deference to the factual findings of the Tribunal and the Tribunal's findings of fact are not to be disturbed.

101. The Court, in arriving at its own analysis with respect to "strike" or "lockout" notices are considered "labour disruptions" under s.10 of the *APPR* will arrive at the same answer as the Tribunal.

Costs

102. The Respondent therefore opposes all of the relief sought by the Petitioner and seeks to have the Petition dismissed with costs to the Respondent.

103. WestJet seeks its costs in the cause, payable forthwith.

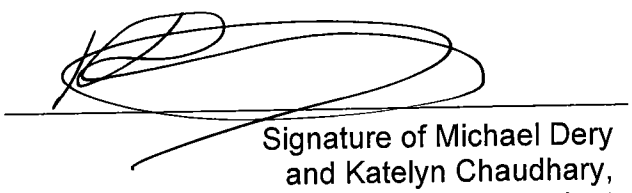
PART 6: MATERIAL TO BE RELIED ON

104. Affidavit #1 of C. Machado dated August 19, 2024.

105. Such other materials as the Respondent may advise.

The Respondent estimates that the application will take 2 hours.

Dated: August 19, 2024



Signature of Michael Dery
and Katelyn Chaudhary,
lawyers for the Respondent